

The University of Akron
IdeaExchange@UAkron

Akron Law Review

Akron Law Journals

July 2015

Minimizing Liability for Church-Related Counseling Services: Clergy Malpractice and First Amendment Religion Clauses

Constance Frisby Fain

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>



Part of the [Law Commons](#)

Recommended Citation

Fain, Constance Frisby (2011) "Minimizing Liability for Church-Related Counseling Services: Clergy Malpractice and First Amendment Religion Clauses," *Akron Law Review*: Vol. 44 : Iss. 1 , Article 6.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol44/iss1/6>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

MINIMIZING LIABILITY FOR CHURCH-RELATED COUNSELING SERVICES: CLERGY MALPRACTICE AND FIRST AMENDMENT RELIGION CLAUSES

*Constance Frisby Fain**

I. Introduction	222
II. The Clergyperson's Duty of Care.....	226
III. Clergy Malpractice: Negligent Pastoral Counseling	228
A. Defining Clergy Malpractice	228
B. Judicial Analyses of Clergy Malpractice Claims.....	231
IV. First Amendment Religion Clauses: Defenses To Clergy Malpractice and Other Tort Claims Against Pastors and Churches.....	242
A. Establishment Clause Analysis.....	244
B. Free Exercise Clause Analysis.....	247
V. Conclusion: Minimizing Liability for Church-Related Counseling Services	251
A. Utilizing Reasonable Care In Hiring A Pastor Or Counselor	252
B. Adopting A Pastoral Counseling Policy Emphasizing Biblical Advice	253
C. Employing A Counseling Agreement.....	253
D. Referring Parishioners To Psychiatric Or Other Professional Counselors.....	254
E. Avoiding Particular Counseling Situations.....	256
F. Keeping Counseling Records.....	257
G. Complying With State Licensing Laws	258
H. Procuring Professional Liability Insurance.....	258

* Earl Carl Professor of Law, Thurgood Marshall School of Law; LL.M., University of Pennsylvania; J.D., Texas Southern University; B.S., Cheyney University of Pennsylvania. The author thanks the following persons for their valuable research assistance and technical support: Danny Norris (Faculty Service Librarian—Attorney); Professor DeCarlous Spearman (Library Director—Attorney); Melissa Rickard (Administrative Assistant—Attorney); and Herbert S. Fain (Professor of Ethics—Houston Graduate School of Theology).

I. Additional Ways Of Minimizing Church Counseling Liability259

I. INTRODUCTION

Pastors of churches and other clergypersons, who have been involved in private counseling, have been especially susceptible to lawsuits alleging clergy malpractice and other significant torts.¹ Churches and other religious institutions are being subjected to suits based on vicarious liability and/or direct liability in connection with tort claims against pastors and other employees hired by these institutions.²

1. See, e.g., *Doe v. Roman Catholic Diocese of Rochester*, 907 N.E.2d 683 (N.Y. Ct. App. 2009) (claims against a priest for breach of fiduciary duty and against a bishop and diocese alleging negligent retention and supervision); *Petrell v. Shaw*, 902 N.E.2d 401 (Mass. 2009) (complaint filed against a church diocese, bishops and others alleging breach of fiduciary duty, vicarious liability, and negligent hiring, supervision and retention); *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007) (claims against pastor, church, and elders for professional negligence, defamation, intentional infliction of mental distress, and other actions after the termination of a counseling relationship between claimant and the pastor); *Wende C. v. United Methodist Church*, 776 N.Y.S.2d 390 (App. Div. 2004), *aff'd*, 794 N.Y.S.2d 282 (claims against a pastor and church officials asserting clergy malpractice and breach of fiduciary duty); *Mabus v. St. James Episcopal Church (Mabus I)*, 884 So.2d 747 (Miss. 2004) (en banc) (suit against a priest, church and diocese alleging clergy malpractice, breach of fiduciary duty, negligent infliction of emotional distress, invasion of privacy, negligent misrepresentation, fraudulent concealment, and negligent retention and supervision); *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198 (Utah 2001) (action for clerical malpractice); *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994) (suit against a pastor and church averring professional negligence, negligent infliction of mental distress, breach of fiduciary duty, and a statutory violation); *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988) (claims against a church and church-related counselors alleging wrongful death based on "clergyman malpractice" and outrageous conduct); *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987) (claims for defamation, invasion of privacy, intentional infliction of emotional distress, and others).

2. See, e.g., *Chenevert v. Redemptorists/Denver Province*, No. 09-473-JJB, 2010 WL 1609971 (M.D. La. Apr. 20, 2010) (alleging vicarious liability against a Catholic church for the harm sustained as a result of sexual abuse of plaintiff by a priest—claims of direct liability were also made against the church for negligence, intentional infliction of mental distress, breach of fiduciary duty, negligent misrepresentation, and fraud); *Redwing v. Catholic Bishop for The Diocese of Memphis*, No. W2009-00986-COA-R10-CV, 2010 WL 2106222 (Tenn. Ct. App. May 27, 2010) (asserting direct liability against a Catholic Diocese for sexual abuse of plaintiff by a priest arising from the negligent hiring, supervision and retention of the priest, as well as breach of fiduciary duty); *Gray v. Darby*, No. 08-CV-02527, 2009 U. S. Dist. LEXIS 25426 (E. D. Pa. Mar. 26, 2009) (asserting the application of respondeat superior or vicarious liability to a church and its regional Conference and District Superintendent for various torts and statutory violations of an acting pastor at a school and childcare facility positioned on the church's premises); *Petrell v. Shaw*, 902 N.E.2d 401 (Mass. 2009) (alleging vicarious liability; negligent hiring, retention and supervision; and other claims against a diocese and several bishops); *In re Roman Catholic Church of Diocese of Tucson*, No. CV 06-373-TUC-MHM, 2008 WL 509386 (D. Ariz. Feb. 22, 2008) (alleging the liability of a diocese based on the doctrine of respondeat superior—vicarious liability—and several other claims); *Doe v. Roman Catholic Diocese of Rochester*, 907 N.E.2d 683 (N.Y. Ct. App. 2009)

A primary goal of all religious institutions should be to develop strategies of minimizing their liability for church-related counseling services for the protection of the church and the parishioner, which are addressed extensively in Part V of this article.

Counseling provided by a pastor may be nonsecular or religious, thereby focusing on the provision of biblical or spiritual advice. Conversely, the pastor's counseling may be secular or professional, which would not involve religious advice. Whether the advice is nonsecular or secular, the pastor or other church official, who harms a parishioner or non-parishioner, may be sued for damages due to clergy malpractice in connection with such counseling.³ Courts, however, have historically declined to allow recovery in torts cases in which the matter to be resolved entailed a religious dispute as opposed to a secular conflict.⁴ This avoidance of religious disputes by the courts is based on the First Amendment Establishment and/or Free Exercise Clause, also referred to as the religion clauses.⁵

Civil claims against clergypersons, asserting malpractice in connection with spiritual ministry, spiritual counseling, and/or pastoral counseling, have been litigated in at least the last thirty years under the guise of clergy malpractice.⁶ The courts, however, have recognized a

(alleging the negligent retention and supervision of a priest by a diocese and a bishop); *Schovanec v. Archdiocese of Oklahoma City*, 188 P.3d 158 (Okla. 2008) as corrected, (July 2, 2008); *Doe v. Liberatore*, 478 F. Supp.2d 742 (M.D. Pa. 2007) (alleging vicarious liability; negligent hiring, supervision and retention; and other actions against a diocese, a church bishop, a monk, and a second priest); *Mabus v. St. James Episcopal Church*, 884 So.2d 747 (Miss. 2004) (pleading the negligent retention and supervision of a priest by a church and diocese, as well as other tort causes of action); *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Minn. Ct. App. 2003) (averring negligent supervision of a pastor by the regional district of a church); *Ayon v. Gourley*, 47 F. Supp.2d 1246 (D. Colo. 1998), *aff'd on other grounds*, 185 F.3d 873 (10th Cir. 1999) (claiming negligent supervision of a priest by an archdiocese); *Smith v. Privette*, 495 S.E.2d 395 (N.C. 1998) (asserting negligent supervision and retention of a clergyperson by a church and other ecclesiastical bodies); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441 (Me. 1997) (alleging negligent supervision of a priest by a church); *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 654 N.Y.S.2d 791 (App. Div. 1997) (pleading negligent retention and supervision of a priest by a diocese); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991) (alleging negligent retention and supervision of a pastor by a religious governing body).

3. See *infra* Sections III, IV, and accompanying notes.

4. See *infra* Section IV.

5. *Id.*

6. Seemingly, there are no records prior to 1980 of any cases in which clergy malpractice was asserted. The complaint in *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988), was originally filed on March 31, 1980 entitled "COMPLAINT FOR CLERGYMAN MALPRACTICE: WRONGFUL DEATH, NEGLIGENCE, OUTRAGEOUS CONDUCT" *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303, 309 (Cal. Ct. App. 1984) (Hanson, J., dissenting).

number of suits against churches regarding nondoctrinal, as well as doctrinal issues, for over a century.⁷ Furthermore, it appears there has been an increase in the number of tort actions against clerics and religious establishments for professional or clergy misconduct since 1980.⁸ According to one writer, a reason for this apparent escalation may be the fact that fundamentalist churches are providing more personal, spiritual, and psychological counseling to parishioners and

7. The following cases involve spiritual and nonspiritual-related complaints against church officials, churches, and other religious institutions or organizations. *See, e.g., Doe v. Brouillette*, 906 N.E.2d 105 (Ill. App. Ct. 2009); *Hyde Park Baptist Church v. Turner*, No. 03-07-00437-CV, 2009 Tex. App. LEXIS 586 (Tex. App. Jan. 30, 2009); *K. J. v. The Roman Catholic Bishop of Stockton*, No. C058034, 2009 Cal. App. LEXIS 538 (Cal. App. Apr. 10, 2009); *Gray v. Darby*, No. 08-CV-02527, 2009 U.S. Dist. LEXIS 25426 (E.D. Pa. Mar. 26, 2009); *Marmelstein v. Kehillat New Hempstead*, 892 N.E.2d 375 (N.Y. 2008); *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 156 P.3d 806 (Utah 2007); *Bear Valley Church of Christ*, 928 P.2d 1315 (Colo. 1996) (en banc); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989); *Fisher v. Northmoor United Methodist Church*, 679 S.W.2d 305 (Mo.Ct. App.1984); *Morgan v. Hartford Acc. & Indem. Co.*, 402 So.2d 640 (La. 1981); *Helton v. Forest Park Baptist Church*, 589 S.W.2d 217 (Ky. Ct. App. 1979); *Battig v. Hartford Accident & Indem. Co.*, 482 F.Supp. 338 (W.D.La. 1977), *aff'd*, 608 F.2d 119 (5th Cir. 1979); *Coolbaugh v. St. Peter's Roman Catholic Church*, 115 A.2d 662 (Conn. 1955); *Sullivan v. First Presbyterian Church Waterloo*, 152 N.W.2d 628 (Iowa 1967); *Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus and Mary*, 186 N.E. 798 (N.Y. 1933); *Hudson v. Church of The Holy Trinity*, 166 N.E. 306 (N.Y. 1929); *Magnuson v. O'Dea*, 135 P. 640 (Wash. 1913); *Whittaker v. Sandford*, 85 A. 399 (Me. 1912); *Bruce v. Central Methodist Episcopal Church*, 110 N.W. 951 (Mich. 1907); *Hellstern v. Katzer*, 79 N.W. 429 (Wis. 1899); *Davis v. Central Congregational Soc.*, 129 Mass. 367, 1880 WL 10838 (1880).

8. The list below contains examples of professional or clergy misconduct cases decided since 1980 when the complaint was originally filed in *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988). The *Nally* case involved a wrongful death claim asserting clergy malpractice against a Protestant church and four of its pastors. Additional examples of clergy misconduct cases include: *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987); *Strock v. Pressnell*, 527 N.E.2d 1235 (Ohio 1988); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (en banc); *Bladen v. First Presbyterian Church of Sallisaw*, 857 P.2d 789 (Okla. 1993); *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907 (1993); *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996) (en banc); *F. G. v. MacDonell*, 696 A.2d 697 (N.J. 1997); *Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998); *Teadt v. Lutheran Church Missouri Synod*, 603 N.W.2d 816 (Mich. Ct. App. 1999); *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198 (Utah 2001); *Richelle v. Roman Catholic Archbishop*, 130 Cal. Rptr. 2d 601 (Ct. App. 2003), *as modified*, Mar. 17, 2003; *Wende C. v. United Methodist Church*, 776 N.Y.S.2d 390 (App. Div. 2004); *Vione v. Tewell*, 820 N.Y.S.2d 682 (Sup. Ct. 2006); *Doe v. Liberatore*, 478 F.Supp. 2d 742 (M.D. Pa. 2007); *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007); *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 892 N.E.2d 375 (N.Y. 2008); *Doe v. Roman Catholic Diocese of Rochester*, 907 N.E.2d 683 (N.Y. Ct. App. 2009); *Cerninka v. Hartford Roman Catholic Diocesan Corp.*, No. X10UWYCV08500885S, 2009 WL 765486 (Conn. Super. Ct. Feb. 24, 2009); *Mallory v. Hartford Roman Catholic Diocesan Corp.*, No. X10UWYCV075007645S, 2009 WL 765485 (Conn. Super. Ct. Feb. 24, 2009); *Gray v. Darby*, No. 08-CV-02527, 2009 U.S. Dist. LEXIS 25426 (E.D. Pa. Mar. 26, 2009); *Petrell v. Shaw*, 902 N.E.2d 401 (Mass. 2009).

others.⁹ This movement by fundamentalist churches toward greater involvement in the field of psychological counseling, as well as the litigious nature of society, indicates a possible increase in future clergy malpractice litigation.¹⁰ Churches in general appear to be providing more counseling services to their congregants. Consequently, many pastor-counselee relationships have resulted in negligent pastoral and/or professional counseling, thereby engendering a number of lawsuits. These lawsuits involving negligent counseling and other significant tort claims include: assertions of negligent counseling by a protestant minister resulting in a parishioner's suicide;¹¹ negligent marital counseling resulting in a sexual relationship between a Roman Catholic priest and a parishioner;¹² disclosure of confidential communications by an ordained Baptist minister to church officials and parishioners;¹³ defamation of a parishioner-counselee by a pastor after the parishioner terminated their marital counseling relationship;¹⁴ invasion of privacy by a pastor who agreed to provide family counseling to a husband and wife and their children;¹⁵ and various other tort actions.¹⁶ It has been recommended that churches and other religious organizations use protective measures to minimize their liability for church-related

9. Lawrence M. Burek, Note, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPP. L. REV. 137, 137-38 (1986).

10. *Id.*

11. *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988).

12. *See Destafano v. Grabrian*, 729 P.2d 1018 (Colo. Ct. App. 1986), *aff'd in part and rev'd in part*, 763 P.2d 275 (Colo. 1988) (en banc).

13. *See Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987).

14. *See Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007).

15. *See Barnett*, 723 S.W.2d at 544. *See also Schauer v. Diocese of Green Bay*, No. 2007AP1262, 2008 WL 2097379 (Wis. App. May 20, 2008) (claims made by plaintiff against a priest and Diocese alleging sexual abuse of the plaintiff—when he was a student—during a counseling session with the priest).

16. *See, e.g., Chenevert v. Redemptorists/Denver Province*, No. 09-473-JJB, 2010 WL 1609971 (M.D. La. Apr. 20, 2010) (alleging negligence, intentional infliction of mental distress, breach of fiduciary duty, negligent misrepresentation, and fraud); *Redwing v. Catholic Bishop for The Diocese of Memphis*, No. W2009-00986-COA-R10-CV, 2010 WL 2106222 (Tenn. Ct. App. May 27, 2010) (alleging negligence of Diocese in hiring, supervising and retaining a priest who sexually abused minors, and breach of fiduciary duty for failure to investigate, warn, and protect against abuse); *Petrell v. Shaw*, 902 N.E.2d 401 (Mass. 2009) (alleging breach of fiduciary duty, negligent conduct, and vicarious liability); *K. J. v. The Roman Catholic Bishop of Stockton*, No. C058034, 2009 Cal. App. LEXIS 538 (Cal. Ct. App. Apr. 10, 2009) (alleging negligence, intentional infliction of emotional distress, and constructive fraud); *Hyde Park Baptist Church v. Turner*, No. 03-07-00437-CV, 2009 Tex. App. LEXIS 586 (Tex. Ct. App. Jan. 30, 2009) (asserting intentional torts and negligence); *Marmelstein v. Kehillat New Hempstead*, 892 N.E.2d 375 (N.Y. 2008) (claiming negligent and intentional infliction of emotional distress, breach of fiduciary duty, and other causes of action); *Doe v. Liberatore*, 478 F. Supp. 2d 742 (M.D. Pa. 2007) (claiming assault, battery, negligence per se, breach of fiduciary duty, and other actions).

counseling services.¹⁷ Church members and others who seek counseling from pastors and professional counselors, who offer counseling services at churches and other theological establishments, will also benefit from these protective devices. It is important that churches consider the suggestions outlined in Part V of this article focusing on such things as: conducting background investigations to determine the experience, credentials, criminal history and overall character of a pastor or counselor applicant; creating a pastoral counseling policy for the church; making sure that the pastoral counselor emphasizes biblical counseling; employing a written counseling agreement; referring parishioners to professional counselors when appropriate; avoiding particular counseling situations; keeping thorough records of counseling sessions; and adhering to state licensing laws applicable to professional counselors. These and other helpful recommendations are addressed in more detail in Part V as positive methods of minimizing church liability and ultimately shielding the parishioner from unnecessary harm.

Part II of this article presents a discussion of the clergy person's duty of care to parishioners. Part III addresses clergy malpractice, which focuses on negligent pastoral counseling and judicial analyses of such claims. Part IV examines First Amendment defenses to clergy malpractice and other tort claims against pastors, churches and other religious organizations with emphasis on the religion clauses. Finally, Part V suggests various methods of minimizing liability for church-related counseling services.

II. THE CLERGYPERSON'S DUTY OF CARE

As with other negligence claims, duty of care is a required element of proof in a clergy malpractice action.¹⁸ A defendant will not be subject to liability for negligence unless the injured complainant can prove the existence of a duty to use reasonable care, that there was a breach of that duty, and that the breach of the duty proximately or legally caused the damage.¹⁹ A duty is "a legally sanctioned obligation" owed by one person to another.²⁰ For instance, the court in one clergy malpractice

17. See *infra* section V.

18. *Nally v. Grace Community Church of the Valley*, 763 P.2d 948, 955-56 (Cal. 1988).

19. *Id.* at 956; *Petrell v. Shaw*, 902 N.E.2d 401, 408 (Mass. 2009). See also *Mabus v. St. James Episcopal Church (Mabus I)*, 884 So.2d 747, 764 (Miss. 2004) (en banc) (stating in order "[t]o prevail on a negligence claim, the plaintiff must establish by a preponderance of the evidence each of the elements of negligence: duty, breach, causation and injury").

20. STEVEN H. GIFIS, *LAW DICTIONARY* 148 (1984).

case²¹ identified several factors that must be weighed in deciding whether a duty of care is in fact present in a given case.²² Those factors comprise the following:

[F]oreseeability of harm to [the injured party], the degree of certainty that [he] suffered injury, the closeness of the connection between [defendants'] conduct and the injury suffered, the moral blame attached to [defendants], the policy of preventing future harm, the extent of the burden to the defendant[s] and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.²³

Standard of care is one component of legal duty.²⁴ A complainant must identify the applicable standard of care in a malpractice case in order to present appropriate evidence to the judge and/or jury concerning the required conduct of a defendant.²⁵ Standard of care pertains to the behavior or conduct required of an individual in a given situation.²⁶ The reasonable person standard is basic and has been defined as “that degree of care which a reasonably prudent person should exercise under the same or similar circumstances.”²⁷ It has been stated that professionals and persons who engage in work requiring special skills must exercise a standard of minimum skill, knowledge, ability, training, and competence possessed by members of that profession, trade, or calling in good standing, in addition to exercising reasonable and ordinary care in what they do.²⁸ Suits against religious establishments and clergypersons have addressed the applicability of the professional standard to this unique group, as well as issues germane to the clergy malpractice cause of

21. *Nally*, 763 P.2d at 948.

22. *Id.* at 956. For additional court analyses of the duty of care element in the context of other clergy malpractice claims, see *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 204-06 (Utah 2001); *Dausch v. Rykse*, 52 F.3d 1425, 1430-34 (7th Cir. 1994) (Ripple, J., concurring in part and dissenting in part).

23. *Nally*, 763 P.2d at 956.

24. W. PAGE KEETON, ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 164 (5th ed. 1984); DAN B. DOBBS, *THE LAW OF TORTS* 270 (2000).

25. See, e.g., DOBBS, *THE LAW OF TORTS*, *supra* note 24, at 631-33.

26. KEETON ET AL., *supra* note 24, at 164-208; DOBBS, *supra* note 24, at 270, 275-79; STUART M. SPEISER, ET AL., 2A *THE AMERICAN LAW OF TORTS* § 9:4, at 525-35 (2009).

27. WILLIAM P. STATSKY, *WEST'S LEGAL THESAURUS DICTIONARY* 713 (1985).

28. STUART M. SPEISER, ET AL., 4 *THE AMERICAN LAW OF TORTS* § 15.1, at 453-54 (2009). See also DOBBS, *supra* note 24, at 683-84 (addressing clergy malpractice, one type of professional negligence); KEETON ET AL., *supra* note 24, at 185; WILLIAM L. PROSSER, ET AL., *CASES AND MATERIALS ON TORTS* 168-96 (11th ed. 2005).

action.²⁹ Consequently, if a court determines that the professional standard applies in a case, the clergy professional may be held liable for damages if the court finds that his or her conduct has not conformed to what a reasonable, prudent, competent professional would have done under similar circumstances.³⁰

III. CLERGY MALPRACTICE: NEGLIGENT PASTORAL COUNSELING

A. *Defining Clergy Malpractice*

Clergy malpractice is one of many types of professional liability actions. Professional liability pertains to actions brought against professional persons in their capacity as professionals.³¹ The malpractice of a professional, such as a clergyperson, may be described generally as “the negligence of a professional in the exercise of that profession.”³² Therefore, in order for liability to be imposed on a professional person, there must be “an act by a person who, [while] engaging in a particular profession under license or other privilege, fails to exercise the required care and skill reasonably required of like professionals; and who, by virtue of that negligence, causes . . . injury to the person to whom the professional duty is owed.”³³ A claim for clergy malpractice generally pertains to negligent “pastoral counseling and is based on the alleged wrongful conduct or advice of the clergy member in causing the situation presented for counseling to deteriorate further.”³⁴

29. See, e.g., *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994); *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198 (Utah 2001); *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007); *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988); *Milla v. Tamayo*, 232 Cal. Rptr. 685 (Cal. Ct. App. 1986); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (en banc); *Baumgartner v. First Church of Christ Scientist*, 490 N.E.2d 1319 (Ill. App. Ct. 1986); *Strata v. Patin*, 545 So.2d 1180 (La. App. 1989); *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *Lund v. Caple*, 675 P.2d 226 (Wash. 1984).

30. See, e.g., MARTIN WEINSTEIN, SUMMARY OF AMERICAN LAW 522-23 (1988); *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994).

31. John W. Wade, *An Overview of Professional Negligence*, 17 MEM. ST. U. L. REV. 465, 465-66 (1987).

32. Weinstein, *supra* note 30, at 522. See *Byrd v. Faber*, 565 N.E.2d 584, 586 (Ohio 1991) (describing “clergy malpractice” focusing on the standard of care component of such a claim); see generally DOBBS, *supra* note 24, at 683-84.

33. Weinstein, *supra* note 30, at 522. See also RESTATEMENT (SECOND) OF TORTS § 299A (1965); DOBBS, *supra* note 24, at 681-88.

34. Louis A. Frumer and Melvin I. Friedman, *Religious Organizations and Institutions*, Personal Injury—Actions, Defenses, Damages, § 117.04 [2][c] (MB) (2010). One case described clergy malpractice as “the failure to exercise the degree of care and skill normally exercised by members of the clergy in carrying out their professional duties.” *Byrd v. Faber*, 565 N.E.2d 584,

586 (Ohio 1991). See, e.g., *Petrell v. Shaw*, 902 N.E.2d 401 (Mass. 2009). In the *Petrell* case, a female parishioner sued a church and three bishops for breach of fiduciary duty, negligent hiring and retention, and other wrongful acts. The parishioner claimant sought marriage counseling from the parish rector, and he initiated a sexual relationship with the parishioner which resulted in her filing for divorce. *Id.* at 404-05. *Marmelstein v. Kehillat New Hempstead*, 892 N.E.2d 375 (N.Y. 2008). In *Marmelstein*, a claim was filed by the claimant who was enticed into a sexual relationship with an Orthodox Jewish rabbi during a period that he was counseling the claimant concerning various personal, financial, and legal problems. The claimant alleged intentional and negligent infliction of mental distress, breach of fiduciary duty, fraud, and negligent retention of the rabbi on the part of the synagogue. *Id.* at 376-77. *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007). In the *Westbrook* case, a former parishioner, who had been receiving marital counseling from the church pastor, sued the pastor and other officials for professional negligence, defamation, intentional infliction of mental distress, and breach of fiduciary duty. *Id.* at 392-94. *Vione v. Tewell*, 820 N.Y.S.2d 682 (N. Y. Sup. Ct. 2006). The parishioner complainant sued his former minister-counselor, the church, and others, seeking damages due to an affair the minister was having with the parishioner's wife while the couple was receiving marriage counseling. *Id.* at 683-84. *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987). In the *Hester* case, a complaint was filed by a husband and wife alleging six causes of action, including ministerial malpractice. *Id.* at 549. Among other things, the plaintiffs sought damages from the defendant, a clergyman, for negligent counseling. *Id.* at 549-50, 554. See also *Strock v. Pressnell*, 527 N.E.2d 1235 (Ohio 1988). In *Strock*, the court relied on *Hester* and dismissed a clergy malpractice suit against a Lutheran minister, who was accused of participating in a voluntary sexual relationship with the plaintiff's wife. *Id.* at 1236, 1239-40. The plaintiff and his wife were receiving marital counseling from the minister. *Id.* at 1236.

The following articles address the subject of clergy malpractice and/or other clergy-related issues: Freddie Baird, *Tyla Law for the Clergy Conference: Avoiding Legal Landmines*, 60 TEX. B. J. 344 (1997); Burek, *supra* note 9; Steven Chase, *Clergy Malpractice: The Cause of Action That Never Was*, 18 N.C. CENT. L. J. 163 (1989); Marie M. Fortune, et al., *Introduction*, 4 J. OF RELIGION & ABUSE 1 (2002); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L.L. REV. 79 (2009); Ruth Jones, *The Extrajudicial Resolution of Sexual Abuse Cases: Can the Church be a Resource for Survivors?* 38 SUFFOLK U. L. REV. 351 (2005); Kimmerly Anne Klee, Note, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?*, 17 U. TOL. L. REV. 209 (1985); Greg Slater, Note, *Nally v. Grace Community Church of the Valley: Absolution for Clergy Malpractice?*, 1989 B.Y.U. L. REV. 913 (1989); Zshonette Reed, Note & Comment, *Clergy Malpractice: Defining the Duty and Dismissing the Claim*, 4 J. LEGAL ADVOC. & PRAC. 122 (2002); Janna Statz Nugent, Note, *A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy*, 30 FLA. ST. U. L. REV. 970 (2003); Stephanie D. Young, Note, *Sexual Molestation Within America's Parishes and Congregations: Should the Church be 'Thy Priest's Keeper'?*, 91 W. VA. L. REV. 1097 (1989); and *Constitutional Law-Free Exercise Clause-Texas Supreme Court Holds That Trial Court Lacks Subject Matter Jurisdiction Over Professional Negligence Claim Against Professional Counselor/Church Pastor*, 121 HARV. L. REV. 676 (2007).

The following books address the topic of clergy malpractice and/or clergy-related matters: DAVID D. BALKUM, *SHEEP AMONG WOLVES: TEXAS CHURCHES AND THE LAW* (Pleasant Word 2003); NICHOLAS P. CAFARDI, *BEFORE DALLAS* (Paulist Press 2008); C. R. CAMBRIDGE, *FORGIVE US OUR TRESPASSES* (Hollis Books 1999); DOBBS, *supra* note 24 at 681-88; PATRICK FLEMING ET AL., *BROKEN TRUST* (Crossroad Pub. Co. 2007); RONALD B. FLOWERS, *THAT GODLESS COURT?* (2d ed. Westminster John Knox Press 2005); K. A. FLYNN, *THE SEXUAL ABUSE OF WOMEN BY MEMBERS OF THE CLERGY* (McFarland & Co. 2003); MARIE M. FORTUNE, *IS NOTHING SACRED? WHEN SEX INVADES THE PASTORAL RELATIONSHIP* (Harper & Row 1989); GIBBS LAW FIRM, P. A., *INFORMING THE FAITHFUL* (Christian Law Association 2006); S. J. GRENZ & R. D. BELL, *BETRAYAL*

Pastoral counseling has been defined by one writer as “the use by clergy of counseling and psychotherapeutic methods to enable individuals, couples, and families to handle constructively their personal crises and problems in living. Pastoral counseling draws on insights from contemporary understanding of human personality, therapeutic methods from current counseling approaches, and scriptural and theological resources.”³⁵

A survey of cases has revealed that courts rarely provide a complete definition of clergy malpractice. One writer has created a description from a few cases and other sources. He has stated that the courts appear to be thinking that clergy malpractice is:

(1) negligent conduct that does not qualify as an intentional tort (2) in carrying out a religious act or duty (3) by one in a religious calling (4) directed toward a ‘client’ who has voluntarily accepted the authority or services of the religious actor as being religious in character and (5) of such a nature that legal adjudication would require consideration of religious doctrine or at least religious practices or would otherwise burden the free exercise of religion.³⁶

A cause of action for clergy malpractice, as with other professional negligence cases, requires the claimant to establish a duty of care based on the professional standard of care, a breach of that duty, cause in fact, proximate or legal cause, and damage.³⁷ More specifically, the elements

OF TRUST: CONFRONTING AND PREVENTING CLERGY SEXUAL MISCONDUCT (2d ed. Baker Books 2001); E. A. HORST, QUESTIONS AND ANSWERS ABOUT CLERGY SEXUAL MISCONDUCT (The Liturgical Press 2000); MARGARET C. JASPER, RELIGION AND THE LAW (Oceana Publications 1998); K. A. MCCLINTOCK, PREVENTING SEXUAL ABUSE IN CONGREGATIONS: A RESOURCE FOR LEADERS (The Alban Institute 2004); THOMAS G. PLANTE, SIN AGAINST THE INNOCENTS (Praeger Publishers 2004); W. A. Stacey et al., *How Much Clergy Malfeasance is Really Out There? A Victimization Survey of Prevalence and Perceptions*, in A. SHUPE, ET AL., BAD PASTORS: CLERGY MISCONDUCT IN MODERN AMERICA 187-213 (New York University Press 2000); THOMAS F. TAYLOR, SEVEN DEADLY LAWSUITS: HOW MINISTERS CAN AVOID LITIGATION AND REGULATION (Abingdon Press 1996).

35. Patrick I. Shea, *Constitutional Issues Involved in Regulation of Spiritual Counseling and the Duty to Train*, in TORT AND RELIGION 1 (ABA 1990). See, e.g., *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988); *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987).

36. DOBBS, *supra* note 24, at 683. See also *id.* nn.24-27 (citing *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1320 (Colo. 1996) (en banc) (pertaining to whether the defendant’s conduct was religious); *Byrd v. Faber*, 565 N.E.2d 584, 586 (Ohio 1991) (concerning elements (1), (2) and (3) in the accompanying text to this footnote indicating that “clergy malpractice” does not include torts like battery, only the omission to exercise that level of care and skill ordinarily exercised by clergypersons in performing their professional responsibilities); *F. G. v. MacDonell*, 696 A.2d 697 (N.J. 1997) (addressing the concern of courts if faced with malpractice or sexual misconduct cases that involve free exercise of religion doctrines or practices)).

37. See *Mabus v. St. James Episcopal Church*, 884 So.2d 747, 764 (Miss. 2004) (en banc).

of proof require the breach of a duty of professional care by the clergyperson in providing pastoral counseling or other religious services, which is factually and legally the cause of the parishioner's or claimant's injury.³⁸

B. *Judicial Analyses of Clergy Malpractice Claims*

In recent years, courts throughout the country have frequently been faced with claims against clergypersons and churches alleging clergy malpractice³⁹. Usually, these professional negligence claims have been rejected by courts based on one or both First Amendment religion clauses⁴⁰ and/or because of the reluctance of courts generally to apply to clerics the same level of care imposed upon mental health and other medical professionals.⁴¹

38. See TAYLOR, *supra* note 34, at 110. See, e.g., *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987). The *Hester* court, in referring to malpractice involving the clergy, stated the following: It is a theory of tort . . . which presupposes that every cleric owes, the same duty of care, whatever the religious order which granted ordination, or the cleric serves, or the beliefs espoused. It is a theory of tort, moreover, which inevitably involves the court in a judgment of the competence, training, methods and content of the pastoral function in order to determine whether the cleric breached the duty "to act with that degree of skill and learning ordinarily used in the same or similar circumstances by members of that profession."

Id. at 553.

39. See *supra* note 8.

40. The Establishment and Free Exercise Clauses are the two religion provisions in the First Amendment. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. See, e.g., *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007) (discussing the Free Exercise and Establishment Clauses); *Gulbraa v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 159 P.3d 392, 394-96 (Utah Ct. App. 2007) (emphasizing the Establishment Clause). For a discussion of the two First Amendment religion clauses, see *infra* Section IV and accompanying notes.

41. See *Nally v. Grace Community Church of the Valley*, 763 P.2d 948, 959-61 (Cal. 1988); *White v. Blackburn*, 787 P.2d 1315, 1318-19 (Utah Ct. App. 1990). The facts in the *White* case are similar to those in *Nally*. In *White*, the Utah Court of Appeals considered and dismissed the claimants' clergy malpractice action. The parents alleged negligent failure by clergy to refer their son "to trained professionals." The *White* court stated:

[A]ppellant wishes to impose a duty upon [clergy] to make further inquiry into the alleged family conflicts, and then, if beyond [their] expertise, refer [parishioners] to others who are qualified to treat such problems. Under the present circumstances, charging lay clergy with this duty of care goes too far because it approaches . . . the same level of care imposed upon trained professionals in medicine and psychology.

. . . .

"Even assuming that workable standards of care could be established in the present case . . . [s]uch a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity."

Id. (quoting *Nally*, 763 P.2d at 960).

The case of *Nally v. Grace Community Church of the Valley*⁴² was filed on March 31, 1980⁴³ and has precipitated a number of clergy malpractice lawsuits across the United States. The most recent *Nally* opinion was issued by the Supreme Court of California in 1988 in which the court declined to impose on nontherapist pastoral counselors the duty to prevent suicide or to refer a potentially suicidal person to a licensed mental health professional once suicide becomes a foreseeable risk.⁴⁴ A wrongful death action was filed by the decedent's parents against a Protestant church and four of its pastors, asserting clergy malpractice.⁴⁵ Defendants were accused of negligence and outrageous conduct for failure to prevent the decedent's suicide.⁴⁶ The deceased had a history of emotional problems, which he experienced between 1974 and 1979.⁴⁷ During that period, he was active in a myriad of activities and ministries sponsored by his church.⁴⁸ Furthermore, during the period that the decedent was associated with the church, he experienced personal and family difficulties that necessitated pastoral counseling, secular therapy, and physical examinations by medical doctors.⁴⁹ Prior to the decedent committing suicide by shooting himself in the head with a shotgun, he had participated in at least five pastoral counseling sessions and had attempted to commit suicide by consuming an overdose of an antidepressant drug prescribed by a medical doctor.⁵⁰ Although the decedent indicated his desire to take his own life on more than one occasion, the church clerics who were involved in pastoral or spiritual counseling did not refer decedent to a psychiatrist initially.⁵¹ One of the clerics named in the suit did, however, remind the decedent of the decedent's appointments with the decedent's psychiatrist, who treated the decedent after he attempted suicide and was hospitalized.⁵²

In addressing the issue of whether the defendants, nontherapist counselors, have a legal duty to refer potentially suicidal persons to

42. 763 P.2d 948 (Cal. 1988).

43. *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303, 309-10 (Cal. Ct. App. 1984) (California Court of Appeals dissent). This California Court of Appeals opinion also contains information concerning the plaintiffs' complaint (asserting clergyman malpractice for negligent counseling).

44. *Nally*, 763 P.2d at 960-61.

45. *Id.* at 949.

46. *Id.*

47. *Id.* at 950-52.

48. *Id.* at 950.

49. *Nally*, 763 P.2d at 950-51.

50. *Id.* at 949-51.

51. *Id.* at 951-52.

52. *Id.* at 951.

licensed mental health professionals once self-destruction becomes reasonably foreseeable, the court in *Nally* considered the existence of a special relationship between the deceased and the defendants, and failed to find one.⁵³ The court cited two California cases, *Meier v. Ross General Hospital*⁵⁴ and *Vistica v. Presbyterian Hospital*,⁵⁵ where a duty to prevent foreseeable suicide was imposed on hospitals, which accepted the responsibility of caring for patients who were suicidal, conditioned on the existence of a special relationship between each hospital and its patient.⁵⁶ Contrary to *Meier* and *Vistica*, the decedent in *Nally* did not have a supervised medical relationship with the pastoral counselors at his church.⁵⁷ Furthermore, neither *Meier* nor *Vistica* proposed the extension of a “duty of care to personal or religious counseling relationships in which one person provided nonprofessional guidance to another seeking advice and [where] the counselor had no control over the environment of the individual being counseled.”⁵⁸

The court considered whether there was a sufficient causal connection between the nontherapist pastoral counselor’s conduct (his failure to refer) and the decedent’s suicide.⁵⁹ This causal link was found to be weak because the pastoral counselors arranged appointments, promoted visits and urged cooperation with the five physicians and one psychiatrist who examined the decedent during the period subsequent to his attempts to commit suicide.⁶⁰ The court noted that “[m]ere foreseeability of the harm or knowledge of the danger is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm.”⁶¹ The *Nally* court also commented on the fact that members of the clergy are not required by legislation to obtain licenses like “marriage, family, child and domestic counselors.”⁶² In brief, the court noted that “the Legislature has recognized that access to the clergy for counseling should be free from state imposed counseling standards, and that ‘the secular state is not equipped to ascertain the competence of

53. *Id.* at 956-58.

54. 445 P.2d 519 (Cal. 1968).

55. 432 P.2d 193 (Cal. 1967).

56. *Nally*, 763 P.2d at 956.

57. *Id.* at 957.

58. *Id.*

59. *Id.* at 958, 959 n.7.

60. *Id.* at 959.

61. *Nally*, 763 P.2d at 959.

62. *Id.*

counseling when performed by those affiliated with religious organizations.”⁶³

A federal court decision involving a counseling relationship between a parishioner and a pastor originated in Illinois, a state that has rejected clergy malpractice claims.⁶⁴ Affirming in part the judgment of the United States District Court, the United States Court of Appeals, Seventh Circuit, explained why it approved of the District Court’s rationale concerning the plaintiff parishioner’s professional negligence action in the 1994 case of *Dausch v. Rykse*.⁶⁵ The Court of Appeals agreed with the District Court that the professional negligence action was actually one for clergy malpractice, which was a claim that had been soundly repudiated by Illinois courts, a position similar to that taken by some other courts in this country.⁶⁶

According to the parishioner plaintiff’s complaint in the *Dausch* case, the pastor defendant held himself out, and the church defendants represented as well, that the pastor was “a duly qualified person engaged in providing psychological counseling”⁶⁷ to congregants. In order for the parishioner plaintiff to cope with depression and other emotional problems she was having, during a period of about two years and five months beginning in January of 1988, the plaintiff sought psychological counseling from the pastor.⁶⁸ The plaintiff alleged that during this professional counseling relationship, the pastor “‘compelled, encouraged, fostered, and engaged in dangerous and improper counseling relations with plaintiff,’”⁶⁹ which “‘included sexual contact during the course of the psychotherapy.”⁷⁰ Furthermore, the parishioner

63. *Id.* at 959-60.

64. *Dausch v. Rykse*, 52 F.3d 1425, 1428 (7th Cir. 1994).

65. *Id.* at 1428.

66. *Id.* at 1428, 1432 & n.4 (citing *Handley v. Richards*, 518 So.2d 682 (Ala. 1987); *Moses v. Diocese*, 863 P.2d 310 (Colo. 1993); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (en banc); *Strock v. Pressnell*, 527 N.E.2d 1235 (Ohio 1988); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338 (Mo. 1993) (clergy malpractice action defeated on other grounds); *Bladen v. First Presbyterian Church*, 857 P.2d 789 (Okla. 1993) (clergy malpractice action defeated on other grounds); *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907 (Neb. 1993); *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988); *Fontaine v. Roman Catholic Church*, 625 So.2d 548 (La. Ct. App. 1993); *Jones by Jones v. Trane*, 591 N.Y.S.2d 927 (Sup. Ct. 1992); *E. J. M. v. Archdiocese*, 622 A.2d 1388 (Pa. Super. Ct. 1993)). As stated in *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994) (Ripple, J., concurring in part and dissenting in part), the courts in the preceding cases have declined to acknowledge clergy malpractice actions except for the *Doe* and *Bladen* courts that defeated the action on other grounds.

67. *Dausch*, 52 F.3d at 1428.

68. *Id.*

69. *Id.*

70. *Id.*

plaintiff alleged that “the church defendants knew or should have known of these improper counseling relations.”⁷¹ In the plaintiff’s memorandum in response to the defendants’ motions to dismiss the complaint, the plaintiff stated that she was told by the pastor defendant that her condition required secular psychological counseling, not religious counseling, because religion did not apply to her case.⁷² The plaintiff alleged that she became very attached to the pastor and pre-occupied with the therapy, which the plaintiff believed was being provided by a “capable trained professional” upon whom she could depend for help in managing her personal difficulties.⁷³ Approximately six months after the inception of the counseling relationship, in June of 1988, the pastor allegedly gave the parishioner plaintiff the ultimatum in which the pastor stated: “I have been giving to you, and I need something back for my services. You must give back to me or I will not work with you anymore.”⁷⁴ Allegedly, this is the point at which the therapy sessions began to involve sexual relations between the plaintiff and the pastor defendant lasting until May of 1990.⁷⁵

The *Dausch* court indicated that those courts that have considered, but disallowed clergy malpractice claims, have acknowledged the free exercise of religion implications of that acknowledgement.⁷⁶ Free exercise of religion considerations in this regard, however, would be impertinent if the pastor defendant’s behavior towards the parishioner plaintiff was *not* a part of the church’s beliefs and practices.⁷⁷ The United States Court of Appeals reiterated the United States District Court’s conclusion that the parishioner failed to sufficiently assert that the psychological counseling provided by the pastor defendant was separate from the religious beliefs and practices of the church.⁷⁸ Therefore, First Amendment Free Exercise Clause considerations prevented the parishioner from having a valid action against the church defendants.⁷⁹

Even if the court in *Dausch* decided to recognize a claim for clergy malpractice, the church defendants could not be found vicariously liable for the wrongful conduct of the pastor just because he was an employee

71. *Id.*

72. *Dausch*, 52 F. 3d at 1428 n.3.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Dausch*, 52 F.3d at 1428.

77. *Id.*

78. *Id.*

79. *Id.*

of the church defendants.⁸⁰ The pastor's actions toward the parishioner were "solely for [the pastor's] . . . own benefit and not . . . part of his ministerial duties."⁸¹ No allegation was made by the parishioner "that the church defendants knew or should have known" about the pastor's sexual misconduct or that there was a need to exert control over him.⁸² Consequently, due to this lack of awareness of the pastor's inappropriate relations with the parishioner plaintiff or the need to control the pastor's behavior, the church defendants could not be held liable for "failing to exercise reasonable care over . . . [the pastor] when acting outside of the scope of his employment."⁸³ As to the church defendants, the United States Court of Appeals affirmed the District Court's dismissal of the parishioner plaintiff's professional negligence claim (which the court characterized more accurately as clergy malpractice).⁸⁴ The United States District Court's dismissal of that same claim against the pastor defendant, however, was reversed by the United States Court of Appeals, and the case was remanded.⁸⁵

The Supreme Court of Utah considered a clerical malpractice action and other claims in *Franco v. The Church of Jesus Christ of Latter-day Saints*,⁸⁶ involving harm allegedly sustained by plaintiffs (a former church member and her parents) caused by advice they received during religious counseling sessions provided by the Latter-day Saints (LDS) Church defendants.⁸⁷ According to the complaint, the plaintiffs (Lynette Earl Franco and her parents) requested religious counseling from the bishop of their LDS Church ward⁸⁸ and from the Church stake⁸⁹ president after plaintiff Franco, then fourteen, remembered being sexually abused when she was seven years of age.⁹⁰ The offender was fourteen at the time he committed the wrongdoing, and the abuse was

80. *Id.*

81. *Id.*

82. *Dausch*, 52 F.3d at 1425, 1428.

83. *Id.*

84. *Id.* at 1429.

85. *Id.*

86. 21 P.3d 198 (Utah 2001). In addition to clerical malpractice, the plaintiffs in *Franco* asserted gross negligence, negligent infliction of emotional distress, breach of fiduciary duty, intentional infliction of emotional distress, and fraud. *Id.* at 201.

87. *Id.* at 200.

88. A "ward" has been defined as "an ecclesiastical division of the LDS Church, based upon geographical area." *Id.* at 200 n.1.

89. A "stake" has been defined as "an ecclesiastical division of the LDS Church that consists of several wards." *Id.* at 200 n.3. One who serves as "stake president" in the LDS Church "is the ecclesiastical leader of a stake." *Id.* at 200 n.4.

90. *Franco*, 21 P.3d at 200.

allegedly so extreme that Franco repressed the memory of the incidents.⁹¹ Both Franco and her offender were members of the same church at the time the sexual abuse occurred.⁹²

The advice given to Franco during the counseling sessions was to “forgive, forget, and seek Atonement.”⁹³ Franco requested that the two church defendants, who were counseling her, make a referral to a licensed mental health professional once Franco discovered the need for additional therapy.⁹⁴ Although Franco and her parents were sent to a mental health center, the doctor defendant to whom they were referred was not a licensed mental health professional in the state of Utah.⁹⁵ Furthermore, the doctor’s advice to Franco was similar to that of the church defendants, which was for Franco “to forgive . . . and forget the incidents of sexual abuse rather than to inform the police.”⁹⁶ Since this advice was unacceptable, Franco and her parents procured the services of a different secular counselor, who subsequently informed the police of the sexual abuse.⁹⁷ This in turn led to Franco being “ostracized and denigrated” by the other church members, with the approval of the bishop and the president, who were the LDS Church officials that initially provided the religious counseling to Franco and her parents.⁹⁸ Due to the maltreatment she received from the other parishioners, Franco decided to leave the LDS Church.⁹⁹

The court in the *Franco* case discussed the adjudication of claims for clergy malpractice even though the plaintiffs decided to abandon their malpractice action on this appeal to the Utah Supreme Court.¹⁰⁰ The frequency and uniform rejection of clergy malpractice litigation based on the First Amendment in recent years were noted by the court in spite of the controversial nature of this type of action¹⁰¹ as illustrated in

91. *Id.*

92. *Id.*

93. *Id.* at 201.

94. *Id.*

95. *Id.*

96. *Franco*, 21 P.3d at 201.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 205-06.

101. *Id.* at 204. See, e.g., *Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994) (Ripple, J. concurring in part and dissenting in part, joined by Coffey J. concurring); *Amato v. Greenquist*, 679 N.E.2d 446, 453 (Ill. App. 1997); *Scheiffer v. Catholic Archdiocese*, 508 N.W.2d 907, 912 (Neb. 1993). Generally, these courts have stated that clergy malpractice actions would “entangle the courts in the examination of religious doctrine, practice or church polity,” which is disallowed by the Establishment Clause of the First Amendment. *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 204 (Utah 2001).

Dausch v. Rykse,¹⁰² *Amato v. Greenquist*,¹⁰³ *Schieffer v. Catholic Archdiocese*,¹⁰⁴ *Byrd v. Faber*,¹⁰⁵ *Schmidt v. Bishop*,¹⁰⁶ *White v. Blackburn*,¹⁰⁷ and *Nally v. Grace Community Church of the Valley*.¹⁰⁸

In analyzing the plaintiffs' three other negligence-based claims—namely gross negligence, negligent infliction of emotional distress and breach of fiduciary duty¹⁰⁹—the court in *Franco* indicated its agreement with the LDS Church defendants' argument that these claims were simply “a roundabout way of alleging clergy malpractice.”¹¹⁰ More precisely, the court determined that the gist or substance of plaintiff Franco's three negligence-based claims was that the LDS Church defendants provided bad advice, which amounted to a mishandling of the pastoral counseling relationship and duties.¹¹¹ Consequently, the court had to address the real question in this case—clergy malpractice—regardless of Franco and her parents naming the three negligence-based claims in their complaint as gross negligence, negligent infliction of emotional distress, and breach of fiduciary duty.¹¹² These misdeeds, allegedly committed by the LDS Church defendants, entailed breaching “a duty owed to Franco by advising her to ‘forgive, forget, and seek Atonement’ or by advising her to seek outside help from [defendant] Browning, an unlicensed therapist.”¹¹³

The court stated how the *Franco* case is similar to the *Nally*¹¹⁴ and *White*¹¹⁵ cases, also involving the mishandling of religious counseling

102. 52 F. 3d 1425, 1432 (7th Cir. 1994) (Ripple, J. concurring in part and dissenting in part, joined by Coffey, J. concurring).

103. 679 N.E.2d 446 (Ill. App. 1997).

104. 508 N.W.2d 907 (Neb. 1993).

105. 565 N.E.2d 584 (Ohio 1991).

106. 779 F. Supp.321 (S.D.N.Y. 1991).

107. 787 P.2d 1315 (Utah Ct. App. 1990).

108. 763 P.2d 948 (Cal.1988).

109. *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 205-06 (Utah 2001).

110. *Id.* at 205.

111. *Id.*

112. *Id.* (citing *Dausch v. Rykse*, 52 F. 3d 1425, 1438 (7th Cir. 1994) (“stating that [the] district court correctly determined that [the] plaintiff's claim for breach of fiduciary duty was ‘simply an elliptical way of alleging clergy malpractice’ ”); *Schmidt v. Bishop*, 779 F. Supp. 321, 326 (S.D.N.Y. 1991) (stating that “as with her negligence claim, [plaintiff's] fiduciary duty claim is merely another way of alleging that the [clergyman] grossly abused his pastoral role, that is, that he engaged in malpractice”); *Amato v. Greenquist*, 679 N.E. 2d 446, 451 (Ill. App. 1997) (“stating that ‘we will not determine the justiciability of [plaintiff's] counts based upon the nomenclature used by the plaintiff in entitling the counts’ in determining whether a negligence claim against a cleric is essentially a malpractice claim”).

113. *Franco*, 21 P.3d at 205.

114. 763 P.2d 948 (Cal. 1988).

duties where the claimants asserted clergy malpractice.¹¹⁶ A resolution of that claim could *not* be made absent an initial determination of whether the LDS Church defendants carried out their counseling responsibilities in accordance with “the level of expertise expected of a similar professional, i.e., a reasonably prudent bishop, priest, rabbi, minister, or other cleric in . . . [the] state [of Utah].”¹¹⁷ In fact, the malpractice theory, in a case such as this involving a cleric who is a LDS Church bishop, required the application of the professional standard of care, which is used to determine whether the bishop “breached the duty to act with that degree of ‘skill and knowledge normally possessed by members of that profession.’”¹¹⁸ Interpreting a duty such as this would mandate that a court articulate the standard to be complied with by other reasonable clergypersons in the execution of their religious counseling obligations, which would involve the courts in formulating “the training, skill, and standards”¹¹⁹ applicable to clergypersons of various religious denominations throughout the state that declare “widely varying beliefs.”¹²⁰ The *Franco* court decided that such a task or objective was impossible and unconstitutional; therefore, if the court were to establish the standard of care, et cetera, applicable to clergypersons performing religious counseling, it would encourage “an excessive government entanglement with religion,”¹²¹ thereby violating the Establishment Clause of the First Amendment.¹²²

Recently, the Supreme Court of Texas dismissed several tort claims against a pastor, three church elders, and the Crossland Community Bible Church in the case of *Westbrook v. Penley*.¹²³ The former church member plaintiff communicated confidential information to Westbrook, the pastor, who subsequently disclosed that information in a letter to the

115. 787 P.2d 1315 (Utah Ct. App. 1990).

116. *Franco*, 21 P.3d at 204 (citing *Nally*, 763 P.2d 948; *White*, 787 P.2d 1315).

117. *Franco*, 21 P.3d at 205.

118. *Id.* at 205-06 (citing RESTATEMENT (SECOND) OF TORTS § 299A (1965)).

119. *Franco*, 21 P. 3d. at 206.

120. *Id.*

121. *Id.*

122. *Id.* (citing *Dausch*, 52 F. 3d at 1432 (declaring “that an evaluation of a clergy malpractice claim would require courts to evaluate and investigate religious tenets and doctrines”); *Hester v. Barnett*, 723 S.W. 2d 544, 553 (Mo. Ct. App. 1987) (“stating that clergy malpractice would force courts to judge ‘competence, training, methods and content of the pastoral function’”); *F.G. v. MacDonell*, 696 A. 2d 697, 706 (N.J. 1997) (O’Hern, J., dissenting) (expressing the view “that creating a tort of clergy malpractice would ‘establish an official religion of the state’”); *Bladen v. First Presbyterian Church of Sallisaw*, 857 P. 2d 789, 797 (Okla. 1993) (declaring that “[o]nce a court enters the realm of trying to define the nature of advice a minister should give a parishioner, serious First Amendment issues are implicated”).

123. 231 S.W.3d 389 (Tex. 2007).

congregants and encouraged them to shun the plaintiff, Penley, for entering into a “biblically inappropriate relationship.”¹²⁴ The church’s constitution allowed for the application of the disciplinary process to parishioners who engaged in serious misconduct such as that engaged in by the plaintiff.¹²⁵ Westbrook, a pastor and a licensed professional marriage counselor, along with the other church-related defendants, were sued for professional negligence (malpractice), breach of fiduciary duty, defamation, and intentional infliction of emotional distress.¹²⁶ Plaintiff sought counseling initially from the defendant Westbrook, who was a fellow parishioner at that time.¹²⁷ The plaintiff paid for two or three of the sessions.¹²⁸ Later, Westbrook and others formed a new church, and Westbrook was elected pastor.¹²⁹ A constitution and statement of faith were created containing a disciplinary policy to which all membership applicants were required to indicate their willingness to comply.¹³⁰ As with all applicants, the plaintiff agreed to abide by the church constitution¹³¹ that contained the following ecclesiastical disciplinary policy:¹³²

We believe that one of the primary responsibilities of the church is to maintain the purity of the Body. We are directed by God to be holy. In recognition of the importance of this obligation, the elders will biblically and lovingly utilize every appropriate means to restore members who find themselves in patterns of serious misconduct. When efforts at restoration fail, the elders will apply the Biblical teaching on church discipline, which could include revocation of membership, along with an appropriate announcement made to the membership (Matt 18:15-17; 1 Cor 5:1-5; Gal 6:1, 2; 2 Thes 3:6).¹³³ [Additionally], [t]he church’s constitution provided that, if a member engages in conduct that “violates Biblical standards, or which is detrimental to the ministry, unity, peace or purity of the church,” and the member is unrepentant, “the elders will follow our Lord’s instructions from *Matthew* 18:15-20.”¹³⁴ If the member remains

124. *Id.* at 391.

125. *Id.*

126. *Id.* at 394.

127. *Westbrook*, 231 S.W.3d at 392.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Westbrook*, 231 S.W.3d at 392-93, 402.

132. *Id.* at 392.

133. *Id.*

134. *Matthew* 18:15-17 of the Holy Bible states:

unrepentant and chooses not to resign, the constitution instructs the church authority to revoke the parishioner's membership and announce the member's removal to the congregation. The church's stated goal is "to encourage repentance and restoration of fellowship with the Lord and His people."¹³⁵

The court in *Westbrook* recognized a strong constitutional presumption that supports protecting the interest of the church in handling its own affairs.¹³⁶ Therefore, plaintiff-Penley's secular interest in confidentiality was found to be less important than the church's interest.¹³⁷ Here, the First Amendment defense applied to the church's interest, because this matter involved the defendant-pastor's presumed duty to the plaintiff and the other congregants to adhere to the requirements of the church's disciplinary policy and other provisions of the church constitution.¹³⁸ It is clear that defendant-*Westbrook*'s position as pastor of the Cross Land Community Bible Church, as well as his pastor-parishioner relationship with plaintiff-Penley, imposed this obligation on *Westbrook*.¹³⁹

Generally, when confronted with conflicting secular and nonsecular interests like the ones at issue here, "courts have . . . held that 'a spirit of freedom for religious organizations' prevails . . . even if that freedom comes at the expense of other interests of high social importance"¹⁴⁰ which in this case was Penley's interest in confidentiality. As stated

If your brother sins, go and show him his fault in private; if he listens to you, you have won your brother. But if he does not listen to you, take one or two more with you, so that by the mouth of two or three witnesses every fact may be confirmed. If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector.

Westbrook, 231 S.W.3d at 392 n.1 (quoting *Matthew* 18:15-17 (New American Standard Bible)).

135. *Westbrook*, 231 S.W.3d at 392.

136. *Id.* at 402.

137. *Id.*

138. *Id.* at 402. See also, *supra* text accompanying notes 133-35.

139. *Westbrook*, 231 S.W.3d at 392.

140. *Id.* at 403 (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972)). See also, *Westbrook* 231 S.W.3d at 403 (stating that the practice of shunning

"[does] not . . . constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention," and . . . [that] "[i]ntangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices-or against its members.") (quoting *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 883 (9th Cir. 1987); *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. Ct. App. 1999) (declaring that "the preservation of the free exercise of religion is deemed so important a principle it overshadows the inequities which may result from its liberal application" (quoted in *Westbrook*, 231 S.W.3d at 403)).

earlier, Penley's interest in confidentiality concerned facts about her involvement in an extramarital sexual relationship and plans to divorce her husband, which she communicated privately to Westbrook, the pastor.¹⁴¹ In response to Penley's disclosure, Westbrook counseled Penley and recommended a lawyer who specialized in family law.¹⁴² Additionally, after Westbrook reminded Penley of the church disciplinary policy applicable to members who engage in extramarital affairs, Penley replied that she was relinquishing her church membership.¹⁴³

The *Westbrook* court dismissed the plaintiff's case stating that her "pleading affirmatively negate[d] the court's subject-matter jurisdiction."¹⁴⁴ It was apparent to the court that the former parishioner's professional-negligence action against the pastor defendant "unconstitutionally impinge[d] upon internal matters of church governance in violation of the First Amendment."¹⁴⁵

IV. FIRST AMENDMENT RELIGION CLAUSES: DEFENSES TO CLERGY MALPRACTICE AND OTHER TORT CLAIMS AGAINST PASTORS AND CHURCHES

Historically, courts declined to allow recovery in tort cases in which the matter to be resolved entailed a religious dispute as opposed to a secular conflict.¹⁴⁶ According to the First Amendment to the United

141. *Westbrook*, 231 S.W.3d at 393.

142. *Id.*

143. *Id.*

144. *Id.* at 405.

145. *Id.*

146. The following are examples of cases involving tort claims and other legal issues in which courts have discussed matters related to the Free Exercise or Establishment Clause. Various courts have recognized the autonomy of churches to manage their own internal affairs, resolve their intra-church disputes, decide those church matters that involve religious doctrine, and to be free of governmental encroachment on an individual's belief or legitimate practice of a particular faith or denominational group. *See, e.g.,* Cerninka v. Hartford Roman Catholic Diocesan Corp., No. X10UWYCV085008855S, 2009 WL 765486 (Conn. Super. Ct. Feb. 24, 2009); Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, 892 N.E.2d 375 (N.Y. 2008); Westbrook v. Penley, 231 S.W.3d 389 (Tex. 2007); Hancock v. True Living Church of Jesus Christ of Saints of Last Days, 118 P.3d 297 (Utah Ct. App. 2005); Wende C. v. United Methodist Church, 776 N.Y.S.2d 390 (App. Div. 2004); Turner v. Church of Jesus Christ of Latter-day Saints, 18 S.W.3d 877 (Tex. App. 2000); Williams v. Gleason, 26 S.W.3d 54 (Tex. App. 2000); Klagsbrun v. Va'ad Harabonim of Greater Monsey, 53 F. Supp.2d 732 (D.N.J. 1999); Sanders v. Casa View Baptist Church, 134 F.3d 331 (5th Cir. 1998); Bell v. Presbyterian Church, 126 F.3d 328 (4th Cir. 1997); Najafi v. INS, 104 F.3d 943 (7th Cir. 1997); Amato v. Greenquist, 679 N.E.2d 446 (Ill. App. 1997); L. L. N. v. Clauder, 563 N.W.2d 434 (Wis. 1997); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996); H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. Ct. App. 1995); Young v. N. Ill. Conference

States Constitution, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹⁴⁷ This Amendment containing, in part, two religion clauses applies to the federal government and is applicable to the states through the Fourteenth Amendment liberty component of the Due Process Clause.¹⁴⁸ The essence of the two religion clauses of the First Amendment is the recognition of two areas of sovereignty when issues of government and religion are being adjudicated.¹⁴⁹ The two religion clauses (establishment and free exercise provisions) “are designed to ‘prevent, as far as possible, the intrusion of either [religion or government] into the precincts of the other,’ ”¹⁵⁰ and are grounded on the concept “that ‘both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.’ ”¹⁵¹ The judicial and legislative branches of the government are both restricted by the First Amendment.¹⁵² The following subsections illustrate generally how courts have responded to Establishment Clause and Free Exercise Clause arguments presented by clergypersons, churches and other religious organizations who have been sued for clergy malpractice and other tortious misconduct related or unrelated to counseling services.

of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); E.E.O.C. v. Catholic Univ. of America, 856 F. Supp. 1 (D.D.C. 1994); Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994); Shieffer v. Catholic Archdiocese, 508 N.W.2d 907 (Neb. 1993); Drevlow v. Lutheran Church, Mo. Synod, 991 F.2d 468 (8th Cir. 1993); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Schmidt v. Bishop, 779 F. Supp. 321 (S. D. N. Y. 1991); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D. C. Cir. 1990); Nayak v. MCA, Inc., 911 F.2d 1082 (5th Cir. 1990); White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990); Nally v. Grace Community Church of the Valley, 763 P.2d 948 (Cal. 1988); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) (en banc); Paul v. Watchtower Bible & Tract Soc’y of N. Y., Inc., 819 F.2d 875 (9th Cir. 1987); Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319, *cert. denied*, 479 U.S. 915 (1986); Aguilar v. Felton, 473 U.S. 402 (1985); Serbian E. Orthodox Diocese v. Milivojevic, 426 U.S. 696 (1976); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Minton v. Leavell, 297 S.W. 615 (Tex. Civ. App. 1927); Brown v. Clark, 116 S.W. 360 (Tex. 1909); Watson v. Jones, 80 U. S. (13 Wall.) 679 (1871); Shannon v. Frost, 42 Ky. 253 (1842).

147. U.S. CONST. amend. I.

148. *Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)); *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 202 (Utah 2001).

149. *Westbrook*, 231 S.W.3d at 395.

150. *Id.* at 395 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

151. *Westbrook*, 231 S.W.3d at 395 (quoting *Aguilar v. Felton*, 473 U.S. 402, 410 (1985); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948)).

152. *Westbrook*, 231 S.W.3d at 395 (citing *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960)).

A. Establishment Clause Analysis

The United States Supreme Court addressed the Establishment Clause in *Lemon v. Kurtzman*¹⁵³ stating that this Clause requires “that there should be ‘no law respecting an establishment of religion,’”¹⁵⁴ not simply prohibiting “the establishment of a state church or a state religion.”¹⁵⁵ The term “state” in this context means all levels of government.¹⁵⁶ Consequently, laws “that are ‘a step that could [ultimately] lead to . . . [an] establishment,’”¹⁵⁷ of a religion may constitute an infringement of the First Amendment even though they did not initially establish a religion.¹⁵⁸ According to the three-part test in the *Lemon* case, in order for governmental activity or action *not* to qualify as a “law respecting an establishment of religion,” three requirements must be met.¹⁵⁹ The governmental action (1) must have a “secular legislative purpose,” (2) must “neither advance . . . nor inhibit . . . religion,” and (3) “must *not* foster ‘an excessive government entanglement with religion.’”¹⁶⁰ Many courts have focused on the “excessive government entanglement” prong of the *Lemon* test in deciding matters involving the tort liability of clergypersons under the Establishment Clause.¹⁶¹ The

153. 403 U.S. 602 (1971). The *Lemon* case involved a Rhode Island statute and a Pennsylvania statute providing state aid to parochial elementary and secondary schools. The statutes were invalidated by the United States Supreme Court because they failed the excessive entanglement test since the laws promoted an excessive entanglement between religion and government. Thus, the Establishment Clause of the First Amendment was contravened. *Id.* at 606-07, 613-14. For two scholars’ analyses of the *Lemon* case, see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1330-31 (6th ed. 2000).

154. *Lemon*, 403 U.S. at 612 (quoting U.S. CONST. amend. I). See also *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 203 (Utah 2001).

155. *Lemon*, 403 U.S. at 612. See also *Franco*, 21 P.3d at 203.

156. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

157. *Lemon*, 403 U.S. at 612. See also *Franco*, 21 P.3d at 203.

158. *Lemon*, 403 U.S. at 612. See also *Franco*, 21 P.3d at 203.

159. *Lemon*, 403 U.S. at 612-13. See also *Franco*, 21 P.3d at 203.

160. *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)). See also *Franco*, 21 P.3d at 198, 203; *Gulbraa v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 159 P.3d 392, 394 (Utah Ct. App. 2007).

161. For examples of cases that have addressed or applied the “excessive entanglement” test (the third prong of the *Lemon* test) or the Establishment Clause in general to various tort actions against clergypersons and/or churches, see *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-10 (1976); *Nally v. Grace Community Church of the Valley*, 763 P. 2d 948, 960 (Cal. 1988); *Schmidt v. Bishop*, 779 F. Supp 321, 328 (S.D.N.Y. 1991); *Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994); *H.R.B. v. J.L.G.*, 913 S.W. 2d 92, 98-99 (Mo. Ct. App. 1995); *Konkle v. Henson*, 672 N.E. 2d 450, 454 (Ind. Ct. App. 1996); *L.L.N. v. Clauder*, 563 N.W. 2d 434, 440 (Wis. 1997); *Smith v. Privette*, 495 S.E. 2d 395 (N.C. Ct. App. 1998); *Turner v. Church of Jesus Christ of Latter-day Saints*, 18 S.W.3d 877, 897 (Tex. Ct. App. 2000); *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 202-04, 206 (Utah 2001); *A.B. v. Liberty United Methodist Church*, 2002 WL 31890054 (Mo. Ct.

excessive entanglement test examines the degree of the government's contact with religion. Due to the complex nature of present-day life, church and state contact is unavoidable to some extent.¹⁶² Thus, the concept of "separation of church and state" cannot be interpreted as "the absence of all governmental contact with religion."¹⁶³

The Establishment Clause was asserted as a defense in *Franco v. The Church of Jesus Christ of Latter-day Saints*,¹⁶⁴ in which a former church member and her parents asserted clerical malpractice, negligent and intentional infliction of emotional distress, breach of fiduciary duty, fraud, and other claims against a church, some of the church officials, and others.¹⁶⁵ Referring to the third prong of the *Lemon* test, "excessive government entanglement," the court in *Franco* realized a well settled rule "that civil tort claims against clerics that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred by the First Amendment under the entanglement doctrine."¹⁶⁶ The court also recognized the authority of churches to decide certain issues related to church governance, religious doctrine, and faith without state interference.¹⁶⁷ Conversely, if a tort action

App. W.D. 2002); *Doe v. Norwich Roman Catholic Diocesan Corp.*, 268 F. Supp. 2d 139 (D. Conn. 2003); *Ehrens v. Lutheran Church-Missouri Synod*, 269 F. Supp. 2d 328 (S.D.N.Y. 2003); *Olson v. First Church of Nazarene*, 661 N. W. 2d 254 (Minn. Ct. App. 2003); *J. M. v. Minnesota Dist. Council of Assemblies of God*, 658 N.W. 2d 589 (Minn. Ct. App. 2003); *Mars v. Diocese of Rochester*, 763 N.Y.S.2d 885 (Sup. Ct. 2003); *Mabus v. St. James Episcopal Church* (Mabus I), 884 So. 2d 747 (Miss. 2004); *Wende C. V. United Methodist Church*, 776 N.Y.S. 2d 390 (App. Div. 2004); *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213 (Miss. 2005); *Doe v. Archdiocese of Cincinnati*, 855 N.E. 2d 894 (Ohio Ct. App. 2006), *rev'd by* 880 N.E.2d 892; *Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007); *Young v. Gelineau*, No. PC/03-1302, 2007 R. I. Super. LEXIS 130, at *14-15 (Sept. 20, 2007); *Gulbraa v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 159 P.3d 392, 394-95 (Utah Ct. App. 2007); *Lowery v. Cook*, No. 20061086-CA, 2007 Utah App. LEXIS 93, at *3 (March 15, 2007); *Noll v. The Hartford Roman Catholic Diocesan Corp.*, No. HHDX04CV-02-4034702S, 2008 Conn. Super. LEXIS 2661 (Oct. 20, 2008); *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 892 N.E.2d 375, 378 (N.Y. 2008); *Cerninka v. Hartford Roman Catholic Diocesan Corp.*, No. X10UWYCV085008855S, 2009 WL 765486, at *2-3 (Conn. Super. Ct. Feb. 24, 2009); *Mallory v. Hartford Roman Catholic Diocesan Corp.*, No. X10UWYCV075007645S, 2009 WL 765485, at *2-3 (Conn. Super. Ct. Feb. 24, 2009).

162. *Franco*, 21 P.3d at 203.

163. *Id.*

164. *Id.* at 201. See also *supra* text accompanying notes 86-100.

165. *Id.* at 200-01.

166. *Id.* at 203. See also *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-10 (1976); *Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994); *L. L. N. v. Clauder*, 563 N.W.2d 434, 440 (Wis. 1997); *Gulbraa v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 159 P.3d 392, 395 (Utah Ct. App. 2007).

167. *Franco*, 21 P.3d at 203-04. See also *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

brought against a clergyperson is not germane to his theological efforts, the entanglement doctrine does not prevent such a claim because it is not within the scope of the First Amendment.¹⁶⁸

The courts in *Gulbraa v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*,¹⁶⁹ *White v. Blackburn*,¹⁷⁰ and *Nally v. Grace Community Church of the Valley*,¹⁷¹ articulated a principle similar to that in the *Franco* and *Dausch v. Rykse* cases. That principle provides that the establishment of a claim for clerical malpractice “would create a duty of care for clergy and ‘would necessarily . . . intertwine [that duty] with the religious philosophy of [a] particular denomination or ecclesiastical teachings of the religious entity’ with the courts.”¹⁷²

A violation of the First Amendment was found in the case of *Hancock v. True & Living Church of Christ of Saints of the Last Days*.¹⁷³ This case involved an alleged misrepresentation made by a church to the claimant that she would receive non-spiritual, as well as spiritual assistance, in exchange for a contribution.¹⁷⁴ Specifically, the church promised the claimant property, support, and specified religious benefits if she would make a monetary donation to the church.¹⁷⁵ The church’s promise to provide the claimant with property and support pertained to earthly benefits that amounted to secular activity, which the court found to be a violation of civil law.¹⁷⁶ However, the promise of a “face-to-face meeting with Jesus Christ” was found to be entirely spiritual in nature.¹⁷⁷ Due to the religious character of the matter, the *Hancock* court determined that this issue was “beyond . . . [its] ability to adjudicate,”¹⁷⁸ thereby violating First Amendment principles.¹⁷⁹ These principles appear to be consistent with those in the *Gulbraa*, *White*, *Nally*, *Franco*, and *Dausch* cases above.

168. *Franco*, 21 P.3d at 203 (citing *Heath v. First Baptist Church*, 341 So.2d 265 (Fla. Dist. Ct. App. 1997) (involving a slip and fall negligence action against a church); *Bass v. Aetna Ins. Co.*, 370 So.2d 511 (La. 1979) (involving a negligence action against a church pastor for harm sustained by a parishioner “running in the spirit” at a time when the pastor failed to clear the aisles to allow for such religious expression)).

169. 159 P.3d 392 (Utah Ct. App. 2007).

170. 787 P.2d 1315 (Utah Ct. App. 1990).

171. 763 P.2d 948 (Cal. 1988).

172. *Gulbraa*, 159 P.3d at 395; *White*, 787 P.2d at 1319; *Nally*, 763 P.2d at 960.

173. 118 P.3d 297 (Utah Ct. App. 2005).

174. *Id.* at 298-99.

175. *Id.*

176. *Id.* at 300.

177. *Id.* at 300, n.2.

178. *Id.*

179. *Id.*

As illustrated in the preceding cases, courts have generally held that adjudicating religious controversies would create a conflict with the First Amendment. This holding has been interpreted as forbidding the government from excessive entanglement with church by-laws, church policies, church procedures, and church practices.¹⁸⁰ Since the major purpose of the Establishment Clause is to prevent excessive governmental entanglement with religion, it has been said to be the basis of the doctrine of judicial abstention.¹⁸¹ Consequently, when the concept of judicial abstention or ecclesiastical abstention is addressed, the emphasis is on the competence of a civil court to review or determine religious controversies involving “church discipline, ecclesiastical government,”¹⁸² or parishioners’ conformity to a required standard of moral conduct.¹⁸³ In other words, civil court review of church-related issues would mandate a judicial investigation into “the doctrines and order of an ecclesiastical legal order.”¹⁸⁴

B. *Free Exercise Clause Analysis*

Similar to the Establishment Clause cases, a number of courts have considered actions involving the Free Exercise Clause in which parishioners and others have sued church leaders, churches, and other religious organizations.¹⁸⁵ Courts have noted that the Free Exercise Clause insures “the protection of two concepts, ‘freedom to believe and freedom to act.’”¹⁸⁶ “Freedom to believe” is said to be absolute while

180. *House of God Which Is The Church Of The Living God, The Pillar And Ground Of The Truth Without Controversy, Inc. v. White*, 792 So.2d 491, 493 (Fla. Dist. Ct. App. 2001) (citing *L.L.N. v. Clauder*, 563 N.W.2d 434, 440 (Wis. 1997)).

181. Paul J. Morken, *Church Discipline and Civil Tort Claims: Should Ecclesiastical Tribunals Be Immune?*, 28 IDAHO L. REV. 93, 116-17 (1991/1992).

182. *Id.* at 135. *See also* *Westbrook v. Penley*, 231 S.W.3d 389, 395-400 (Tex. 2007).

183. Morken, *supra* note 181, at 135. *See also* *Westbrook v. Penley*, 231 S.W.3d at 395-400.

184. Morken, *supra* note 181, at 135. *See also* *Westbrook v. Penley*, 231 S.W.3d at 395-400.

185. *See, e.g., Cerninka v. The Hartford Roman Catholic Diocesan Corp.*, No. X10UWYCV085008855S, 2009 WL 765486 (Conn. Super. Ct. Feb. 24, 2009); *Mallory v. The Hartford Roman Catholic Diocesan Corp.*, No. X10UWYCV075007645S, 2009 WL 765485 (Conn. Super. Ct. Feb. 24, 2009); *Petrell v. Shaw*, 902 N.E.2d 401, 409-10 (Mass. 2009); *Noll v. The Hartford Roman Catholic Diocesan Corp.*, No. HHD04CV-02-4034702S, 2008 Conn. Super. LEXIS 2661, at *5-6 (Oct. 20, 2008); *Young v. Gelineau*, No. PC/03-1302, 2007 R.I. Super. LEXIS 130, at *10, 14, 16, 17 (Sept. 20, 2007); *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007); *Dausch v. Rykse*, 52 F.3d 1425, 1428, 1436-37 (7th Cir. 1994); *Mabus v. St. James Episcopal Church*, 884 So.2d 747, 754-55 (Miss. 2004) (en banc); *Richelle L. v. Roman Catholic Archbishop*, 130 Cal. Rptr.2d 601, 616 (Ct. App. 2003), *as modified* Mar. 17, 2003; *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336-38 (5th Cir. 1998).

186. *McNair v. Worldwide Church of God*, 242 Cal. Rptr. 823, 830 (2d Dist. 1987).

“freedom to act” or “religious conduct” is said to be subject to regulation in order to safeguard the public.¹⁸⁷

Recently, the Texas Supreme Court in the case of *Westbrook v. Penley*,¹⁸⁸ described two distinct ways that laws or governmental conduct may burden the free exercise of religion. One way is by hindering a person’s liberty to observe or practice a specific faith.¹⁸⁹ The second way governmental action imposes a burden on religious freedom is by intruding on a church’s ability to manage or govern its own internal matters.¹⁹⁰ The plaintiff in *Westbrook* was a former parishioner who participated in marital counseling sessions with the pastor (a licensed counselor) until she was shunned by the other church members at the urging of the pastor-defendant.¹⁹¹ The reason for the pastor’s conduct toward the plaintiff was her decision to divorce her husband and a “biblically inappropriate” sexual relationship she was having with another man.¹⁹² Plaintiff’s confidential disclosure to the pastor concerning her extramarital affair and divorce decision caused the pastor and church elders to write a letter to the congregation regarding the plaintiff’s actions.¹⁹³ Plaintiff’s claims against the church, the pastor, and church elders for professional negligence, defamation, breach of fiduciary duty, and the commission of other torts were dismissed by the court.¹⁹⁴ Finally, the *Westbrook* court concluded that the plaintiff’s “professional-negligence claim against . . . [the pastor] unconstitutionally impinge[d] upon internal matters of church governance in violation of the First Amendment.”¹⁹⁵

A federal appeals court in *Sanders v. Casa View Baptist Church*,¹⁹⁶ refused to find that the Free Exercise Clause barred claims against a minister-defendant who was sued for counseling malpractice and breach of fiduciary duty by two parishioners, who were also employees of the

187. *Id.* See also *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-38 (5th Cir. 1998); *Noll v. The Hartford Roman Catholic Diocesan Corp.*, No. HHDx04CV-02-4034702S, 2008 Conn. Super. LEXIS 2661, at *5-29 (Oct. 20, 2008).

188. 231 S.W.3d 389 (Tex. 2007).

189. *Id.* at 395 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)).

190. *Westbrook*, 231 S.W.3d at 395 (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996)).

191. *Westbrook*, 231 SW3d at 392-93.

192. *Id.* at 393.

193. *Id.*

194. *Id.* at 394, 405.

195. *Id.* at 405.

196. 134 F.3d 331 (5th Cir. 1998).

church-defendant.¹⁹⁷ The court affirmed the award of a summary judgment by the lower court to the church, thereby declining to impose liability on the church-defendant for negligence and Title VII violations (discrimination and termination based on gender).¹⁹⁸ Furthermore, there was no vicarious liability imposed on the church under the doctrine of respondeat superior for the minister's sexual relationship with the two parishioners that occurred during the period they were receiving marital counseling in which they revealed intimate details about their sexual backgrounds and marriages to the minister.¹⁹⁹ The minister maintained that the two parishioners' claims were not actionable because the clergy misconduct occurred within "inherently ecclesiastical" counseling relationships instead of "purely secular" counseling situations.²⁰⁰ The minister's position, therefore, was that certain religious controversies are prohibited from being judicially reviewed based on the First Amendment.²⁰¹ More specifically, the minister's assertions that he was entitled to a judgment as a matter of law focused on the following: occasional or intermittent discussions of scripture in the marital counseling sessions verifying that the minister's advice and assistance were *not* purely secular or that the evidence established that the two parishioners' allegations were actually noncognizable actions for "clergy malpractice."²⁰²

The court in *Sanders* disagreed with the minister's argument that he was entitled to a judgment as a matter of law stating that "[t]he First Amendment does *not* categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships."²⁰³ Further, the court noted that if it were to accept the minister's position that the Free Exercise Clause prevents judicial review of relationships that do *not* qualify as "purely secular," this could result in the abolition of civil or criminal responsibility for members of the clergy involved in critical religious relationships.²⁰⁴ Even if an ecclesiastical relationship between a minister and a congregant only partially includes "secular beliefs and behavior," the *Sanders* court maintained that religious freedom guaranteed under the Constitution cannot be interpreted by the courts as

197. *Id.* at 333-34, 337-38.

198. *Id.* at 338-40.

199. *Id.* at 333-34, 339.

200. *Id.* at 335.

201. *Sanders*, 134 F.3d at 335.

202. *Id.*

203. *Id.* at 335-36 (emphasis added).

204. *Id.* at 336.

safeguarding those “secular beliefs and behavior.”²⁰⁵ Therefore, according to *Sanders*, if courts do construe and hold that freedom of religion protects secular beliefs and behavior, religious officials would be “impermissibly place[d] . . . in a preferred position in our society.”²⁰⁶

Courts have repeatedly expressed how the Free Exercise Clause has protected clergyperson-parishioner religious relationships and counseling relationships mainly by preventing courts from deciding theological disputes that focus on issues concerning “religious doctrine or practice.” This was articulated in *Sanders v. Casa View Baptist Church*,²⁰⁷ *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,²⁰⁸ and *Thomas v. Review Bd. Of Ind. Employment Security Div.*²⁰⁹ The sacredness of the religious relationship and the counseling relationship is safeguarded further by other religious freedoms according to the courts in *Employment Div. v. Smith*²¹⁰ and *Wisconsin v. Yoder*.²¹¹ Clergy malpractice actions have been “rejected uniformly” by state courts because the judiciary must refrain or abstain from deciding ecclesiastical conflicts concerning matters of doctrine or practice²¹² because clergy malpractice requires that the pertinent standard of care be defined.²¹³ If the courts define that standard, they could become involved in “establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs.”²¹⁴ Additionally, describing that standard would obligate “courts to identify the beliefs and practices of the relevant religion and then . . . determine whether the clergyman had acted in accordance”²¹⁵ with those beliefs and practices. In other words, according to the *Sanders v. Casa View Baptist Church* case, in order for a clergy malpractice action to be recognized, courts would be compelled

205. *Id.*

206. *Id.* at 336 (citing *Cf. County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) (interpreting the first Amendment to preclude the state from favoring religion over nonreligion)).

207. For a discussion of the Free Exercise Clause’s protection of clergyperson-parishioner religious and counseling relationships, see *Sanders*, 134 F.3d at 336.

208. 393 U.S. 440, 449-50 (1969).

209. 450 U.S. 707, 715-16 (1981) ((setting out the rule that “[c]ourts are *not* arbiters of scriptural interpretation”) (emphasis added)).

210. 494 U.S. 872, 877-78, 881 (1990).

211. 406 U.S. 205, 215 (1972).

212. *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337 (5th Cir. 1998) (citing *Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994)(Ripple, J., concurring); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (en banc); *F. G. v. MacDonell*, 696 A.2d 697, 703 (N.J. 1997)).

213. See *F.G.*, 696 A.2d at 703; *Sanders*, 134 F.3d at 337.

214. *Sanders*, 134 F.3d at 337. See also *F.G.*, 696 A.2d at 703.

215. *Sanders*, 134 F.3d at 337. See also *F.G.*, 696 A.2d at 703.

to “identify and apply the teachings of a particular faith.”²¹⁶ This imposes a duty on the courts to decide which conduct and beliefs are components of a particular faith or religion.²¹⁷

The *Sanders* court noted that when the duties upon which a claimant’s clergy malpractice action against a minister, who provides marriage counseling and breaches fiduciary duties do *not* stem from religious tenets, the First Amendment will *not* protect the minister from liability.²¹⁸ Since the jury in the United States District Court determined that the minister held himself out to the claimants as having “the education and experience of a professional marriage counselor,”²¹⁹ the minister’s “counseling activities with the . . . [claimants] were judged, not by a standard of care defined by religious teachings, but by a professional standard of care developed through expert testimony describing what a reasonably prudent counselor would have done under the same or similar circumstances.”²²⁰ The United States Court of Appeals agreed with the District Court and concluded that the two claimants were entitled to a favorable judgment on the basis that their claims were *not* barred by a constitutional principle derived from the First Amendment that provides for judicial abstention.²²¹ In other words, the principle “that the judiciary must abstain from ecclesiastical disputes concerning questions of religious doctrine and practice”²²² did not insulate the minister in *Sanders* from liability since his conduct toward the claimants was not based on the theological beliefs and practices of his church.²²³ Therefore, the minister-defendant did not receive a judgment as a matter of law.²²⁴

V. CONCLUSION: MINIMIZING LIABILITY FOR CHURCH-RELATED COUNSELING SERVICES

Minimizing liability for church-related counseling services is imperative in view of the frequency and increased number of lawsuits being brought against churches, pastors, and other church officials in recent years. Various legal practitioners and scholars have

216. *Sanders*, 134 F.3d at 337.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 338.

224. *Id.*

recommended that churches and other religious organizations do the following to minimize their liability: take reasonable care in hiring pastors; adopt and follow a pastoral counseling policy emphasizing biblical advice as opposed to mental health or family therapy; employ counseling agreements; refer parishioners to psychiatric or other professional counselors if necessary; avoid counseling persons under particular situations, especially members of the opposite sex; keep records of the counseling sessions; comply with state licensing laws applicable to professional counselors; and procure professional liability insurance that covers negligent acts, and other omissions and errors committed by pastors and others with counseling responsibilities.²²⁵ The sections below address each of the preceding items.

*A. Utilizing Reasonable Care In Hiring A Pastor Or Counselor*²²⁶

- Prior to appointing a pastor or engaging the services of a counselor, a church must investigate the person's background to determine his or her experience, credentials, character, and overall fitness.
- Work history information may be obtained by contacting secular employers, churches or other organizations for whom the candidate has worked or served in the past years.
- A criminal background check should be conducted in the states in which the candidate has been employed. If practical, investigate the states where the candidate has resided even if the candidate was not employed or did not serve in a church in those states.
- Request that the candidate give the church permission to do a criminal record investigation by signing a consent form designed for that purpose.
- The church's employment process should also comprise the usual tools like "applications, detailed interviews, reference and education verifications, and follow-up evaluations."²²⁷

225. GIBBS LAW FIRM, *supra* note 34, at 74-82; TAYLOR, *supra* note 34, at 87, 94-96, 99-105, 115-18.

226. GIBBS LAW FIRM, *supra* note 34, at 74. See also Christian Life Commission, Broken Trust: Confronting Clergy Sexual Misconduct 32 (n.d.).

227. GIBBS LAW FIRM, *supra* note 34, at 74-75.

B. Adopting A Pastoral Counseling Policy Emphasizing Biblical Advice

- Create and approve a pastoral counseling policy, and request that the pastoral counselor or church official who is providing such services sign an agreement to comply with the policy.²²⁸
- The pastoral counselor or church official, who is providing spiritual guidance to parishioners, should emphasize and restrict his or her assistance to biblical counseling unless he or she has received training from an accredited institution and is licensed by the state as a professional counselor. A pastoral counselor or church official who does not have such credentials should avoid giving “medical, mental health, . . . family therapy,” marriage counseling or other nonbiblical counseling and refer parishioners to the appropriate professionals.²²⁹
- Since the pastoral counselor should emphasize biblical or spiritual counseling during his or her meetings with counselees, suggested methods of maintaining a spiritual focus include: (a) praying at the beginning of the session; (b) keeping a Bible present, open, and clearly visible during the session; (c) reading one or more Scripture references during the session; (d) assigning scriptural homework to the counselee; and (e) praying at the end of the session.²³⁰
- The counseling policy should require the counselor to be cautious about those to whom he or she provides counsel. Selectiveness as to those individuals one chooses to counsel is crucial. It is much more difficult to terminate a counseling relationship than it is to start one.²³¹

*C. Employing A Counseling Agreement*²³²

- Adults who are being counseled should be required to sign a Counseling Agreement on behalf of himself or herself or on behalf of his or her minor child depending on who is the counselee.
- The person who signs the Counseling Agreement acknowledges and accepts that the type of counseling he or she receives is Biblical, not professional.

228. *Id.* at 75. See also TAYLOR, *supra* note 34, at 100.

229. GIBBS LAW FIRM, *supra* note 34, at 75. See also Constance F. Fain, *Clergy Malpractice: Liability for Negligent Counseling and Sexual Misconduct*, 12 MISS. C. L. REV. 97, 123-24 (1991).

230. GIBBS LAW FIRM, *supra* note 34, at 75-76.

231. *Id.* at 75.

232. *Id.* at 76.

- The person who signs the agreement is indicating his or her acknowledgment that the pastor or other person that provides the counseling services is *not* a state licensed “counselor, social worker, or therapist.”²³³ That signature also expresses recognition that the counselor has *not* been trained as a “professional in psychological counseling, psychiatric therapy, or marriage and family counseling or therapy”²³⁴
- By signing the agreement, the counselee indicates his or her willingness *not* to file a claim against the church for any costs or damages caused by the counseling services of the pastor, other church official or pastoral counselor.
- Signing the agreement represents the counselee’s consent for certain confidential communications to be reported to the proper state law enforcement authorities because the law mandates disclosure.²³⁵ Examples of matters that may fall into this category are child abuse, threats to seriously harm or kill another, or other menacing remarks of violence that could lead to personal or property damage.²³⁶

D. Referring Parishioners To Psychiatric Or Other Professional Counselors

- Parishioners who are experiencing severe problems that necessitate the services of a professional counselor should be referred to a psychiatric counselor or medical professional.²³⁷
- A Baptist minister who has served as a pastoral counselor at a counseling and education center has recommended that a clergyperson make referrals to the appropriate professionals or agencies when encountering a counselee with any of the following problems:²³⁸
 - 1) Counselee who has suicidal thoughts and actions: when a person talks about his or her own death or funeral, the cleric

233. *Id.*

234. *Id.*

235. *Id.*

236. GIBBS LAW FIRM, *supra* note 34, at 83 app. This Appendix contains two Counseling Agreements entitled: (1) Sample Adult Counseling Agreement; and (2) Sample Minor Counseling Agreement.

237. *Id.* at 76. See also TAYLOR, *supra* note 34, at 116-17. For a discussion of a pastoral or denominational counselor’s duty to investigate a parishioner counselee’s suicidal tendencies and make a referral to an appropriate professional, see *Nally*, 763 P.2d at 953-54, 957.

238. Fain, *supra* note 229, at 123-24. See also TAYLOR, *supra* note 34, at 116-17.

should ask direct questions regarding the counselee's thoughts of taking his or her own life. The cleric should stay with the person, notify a family member, and recommend professional help. Confidentiality may be breached when a person is suicidal.

- 2) Counselee who talks a lot about near accidents: This could indicate that the person has an emotional problem.
 - 3) Counselee who has alcohol and drug dependency problems.
 - 4) Counselee who abuses his or her children: the cleric should inform the counselee that he or she must be reported to the state Child Protective Service Agency or other appropriate legal agency, because such conduct is illegal, and because the cleric cares about the family.
 - 5) Counselee who is being abused (child or spouse).
 - 6) Child-counselee who fails to perform to his or her capacity: he or she should be referred for appropriate therapy.
 - 7) Counselees who have extreme marital problems.
 - 8) Counselee who is having a lot of difficulty with life transitions.
 - 9) Counselee who is having serious problems related to puberty.
 - 10) Counselee who is having more than the normal difficulty developing relationships with the opposite sex.
 - 11) Counselee who is experiencing out of the ordinary family problems with older children.
 - 12) Counselee who is having unusual difficulty adjusting to a newborn child.
 - 13) Counselee who is having unusual difficulty with the empty nest syndrome.
 - 14) Counselee who is having extreme difficulty adjusting to retirement.
- A Presbyterian minister, who established himself as an expert in pastoral care, has suggested a three-point test for determining whether a clergyperson should refer a counselee to a mental health professional or social worker.²³⁹ The cleric must ask himself or herself three questions: (1) do I have the time to work with the counselee as long as he or she needs assistance; (2) do I have the proper skills and training to handle the counselee's problems; and (3) do I have the emotional strength to deal with the counselee's

239. Fain, *supra* note 229, at 123.

problems?²⁴⁰ If any of these questions are answered in the negative, the cleric should refer the counselee to a mental health professional, social worker or some other professional who has been trained to handle the counselee's particular type of problem.²⁴¹

E. Avoiding Particular Counseling Situations

- In order to have more control over the counseling relationship and the circumstances involved, the person providing the pastoral counseling services to the counselee should seriously consider the suggestions below. Adherence to these suggestions is likely to prevent liability producing conduct on the part of the pastoral counselor.²⁴²
 - 1) The counseling session, especially with the opposite sex, should be in clear view, perhaps in a room with a window or on a pew in the sanctuary as long as third persons are not able to hear the conversation.²⁴³
 - 2) A church staff member, the pastor's wife or some other trustworthy third person of the same gender should "remain within easy line-of-sight with the counselor" for protection purposes without destroying the clergy-parishioner or counselor-counselee privilege.²⁴⁴
 - 3) If the counseling is conducted in a clearly visible open area or within the presence of a third party, emotional attachment will most likely be avoided, thereby safeguarding the pastor or counselor from groundless allegations of wrongful conduct.²⁴⁵
 - 4) If the person providing the counseling services adheres to the preceding suggestions, an adulterous relationship would most

240. *Id.*

241. *Id.* A policy for handling complaints of alleged unethical professional conduct by clergypersons within the pastoral-parishioner relationship was developed in 1987 by the Northwest District of the American Lutheran Church. It contained the following provision focusing on appropriate referrals as part of pastoral care:

Referral is a vital subject to be learned. Appropriate referral is pastoral care. Knowledge of the limits of one's ability and time is a strength in ministry. The pastor's professional role and personal life are usually enhanced when his/her role is one of pastoral care, concern and spiritual nourishment while in-depth counseling is handled by an outside professional with whom the pastor is familiar. How to refer in a helpful way is a learned skill appreciated by most laypeople.

FORTUNE, *supra* note 34, at 152.

242. GIBBS LAW FIRM, *supra* note 34, at 77-78.

243. *Id.* at 77.

244. *Id.* at 77-78.

245. *Id.* at 77.

likely be prevented because the pastoral counselor's temptation for improper sexual activity may be eliminated. It has been reported that 71% of extramarital affairs involving pastors began in connection with pastoral counseling sessions.²⁴⁶

- 5) If the parent(s) of a minor-counselee is not home, then the pastoral counselor should not go into the child's home.²⁴⁷
- 6) The pastoral counselor should not engage in inappropriate touching with the counselee.
- 7) The pastoral counselor should clearly communicate the church's position that sexual or romantic relationships between counselors and counselees are "absolutely prohibited."²⁴⁸
- 8) The counselor must take the proper steps to guarantee "confidentiality of the counseling sessions."²⁴⁹

*F. Keeping Counseling Records*²⁵⁰

- Since the discussions that take place during counseling sessions are important in providing the counselee with appropriate spiritual guidance and in protecting the pastor or counselor from tort actions, thorough records of the sessions should be kept. Thorough records should include detailed notes containing the following data:
 - 1) Names of the persons present at the sessions and the reason(s) why they are there.
 - 2) Date, day and time of the sessions.
 - 3) Location of the sessions.
 - 4) Total number of the sessions.
 - 5) The counselee's problem and the private nature of the related matters addressed in the sessions.
 - 6) A "reasonable suspicion" on the counselor's part or allegations made by the counselee during sessions concerning the occurrence of child abuse or violent behavior.
 - 7) Threats made by the counselee during a session(s) to injure himself or third persons.

246. *Id.* at 78.

247. *Id.*

248. GIBBS LAW FIRM, *supra* note 34, at 78.

249. *Id.*

250. *Id.* at 79.

- 8) Behavior on the part of the counselee or statements made during one or more sessions indicating he or she is under the influence of alcohol or illegal drugs.
- 9) Biblical advice provided during the sessions, including particular scriptures relied on as authority.
- 10) The pastoral counselor's specific recommendations to the counselee on how he or she should or should not handle the problems he or she is experiencing.
- The pastoral counselor's records of the counseling sessions should be placed in a confidential file which is *not* accessible to anyone other than the counselor.

*G. Complying With State Licensing Laws*²⁵¹

- The majority of state licensing laws do *not* apply to theological counselors unless they misrepresent their qualifications or use professional titles incorrectly.
- Pastors should be careful to avoid violating any state laws that impose criminal penalties for: (1) misrepresenting "themselves as being licensed by the state";²⁵² (2) misrepresenting "themselves as being professional marriage, family, or mental health professionals; [or] (3) [charging] . . . fees for their counseling services."²⁵³

H. Procuring Professional Liability Insurance

- Churches should procure "professional liability insurance" to protect pastors and other church workers who commit negligent acts in carrying out their counseling responsibilities. This type of insurance is also referred to as "errors and omissions insurance."²⁵⁴
- "Pastoral counseling" coverage should be included as a component of the church's insurance policy for biblical or spiritual counseling errors (negligent acts or omissions).²⁵⁵

251. *Id.* at 80.

252. *Id.*

253. *Id.*

254. GIBBS LAW FIRM, *supra* note 34, at 81.

255. *Id.* at 81. See also TAYLOR, *supra* note 34, at 118. See, e.g., *Nally*, 763 P.2d at 960. The court in *Nally* referred to the availability of clergyman malpractice insurance intended "to protect against potential liability for spiritual counseling that causes injury." *Id.*

I. Additional Ways Of Minimizing Church Counseling Liability

- It has been suggested that the pastor or counselor put a limit on the number of counseling sessions, and include this restriction in the Counseling Agreement for the following reasons:²⁵⁶
 - 1) This limitation on the number of counseling sessions should guarantee that the pastor sets aside adequate time to handle other pastoral responsibilities.
 - 2) This limitation on the number of counseling sessions should reduce the danger of the relationship between the pastor and the counselee developing into one of intimacy or alienation.
- It has been reported that many counselees leave their churches because they feel exposed or think they are being used as examples in sermons after being counseled over long periods of time. Limiting the number of counseling sessions may prevent this feeling of exposure on the part of counselees and prevent their ultimate withdrawal from their churches.²⁵⁷
- All counseling appointments should be written on a master calendar schedule to be used for upcoming meetings and as a business record of past meetings. Since this type of schedule keeps the pastor's staff aware of his or her location, the appearance of an "inappropriate secret rendezvous" between the pastor and the counselee would be avoided.²⁵⁸
- Churches should adopt a written counseling policy that restricts pastoral counseling to Biblical or spiritual guidance to protect against state control of pastoral counseling programs.²⁵⁹

In sum, the recommendations listed above are designed to help pastors, churches and other religious organizations avoid or at least minimize their liability for clergy malpractice, negligent counseling and other tortious conduct; therefore, this writer believes that a good strategy would be to adopt these recommendations. Historically, based on statistics, it has been observed that in times of emotional strain or anxiety more parishioners have sought counseling from their clerics than from other professionals, such as psychologists, social workers, psychiatrists, and other types of physicians.²⁶⁰ Apparently, many people

256. GIBBS LAW FIRM, *supra* note 34, at 76-77.

257. *Id.* at 77.

258. *Id.*

259. *Id.* at 80-81.

260. Klee, *supra* note 34, at 219.

feel more comfortable and secure taking their problems to clergypersons than to unknown mental health professionals.²⁶¹ Consequently, the cleric is able to get involved in the parishioner's situation at an earlier stage than other professionals.²⁶² Of course, financial limitations may also prevent many people from seeking other types of professional assistance. Since pastors are regularly being approached by congregants who need counseling services, churches should clearly see why due diligence should be utilized in the hiring of pastors and counselors by reasonably investigating their credentials, character, and overall fitness. Pastors should restrict their assistance to spiritual guidance and avoid giving parishioners mental health, family, marital, or other types of counseling unless pastors have the proper credentials.

Selectiveness by the pastor in deciding which persons to counsel and referral of certain individuals to the proper professionals to handle problems involving suicidal thoughts, alcohol dependency, drug abuse, child or spousal abuse, difficulty adjusting to a newborn child, or other severe difficulties is crucial for the protection of the church and pastor, and ultimately the counselee-parishioner. Requiring that a written counseling agreement be signed by a counselee acknowledging that he is receiving Biblical counseling, not professional advice or guidance, and keeping detailed counseling records are critical in limiting lawsuits against the church, pastor, or counselor. Ignoring state licensing laws applicable to counselors and representing oneself as having a license may lead to tort liability or the imposition of criminal penalties; therefore, pastors must be familiar with relevant laws. Maintaining control over the counseling relationship and the circumstances involved is essential, because a failure to do so may lead to sexual misconduct, breach of confidentiality, or other legal or moral transgressions. Finally, pastors and other church workers who commit negligent acts in carrying out their counseling responsibilities may be protected if churches obtain professional liability insurance. Clearly, these and other strategies may be used effectively to safeguard churches, pastors, counselors and parishioners involved in church-related counseling services.

261. *Id.* at 220.

262. *Id.*